APPENDIX.

Text of Statutes Cited.

Judicial Code, Section 240 (amended):

> (a) In any case civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ or error or appeal.

The Tucker Act (24 Stat. 505), as amended November 23, 1921 (42 Stat. 311), will be found in Section 24 (subd. 20) of the Judicial Code (28 U. S. C. A., §41), reading so far as material, as follows:

> "Sec. 24. The District Court shall have original jurisdiction as follows:
> (20) Suits against United States. Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States * * * in respect to which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable * * * and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive, or in any manner wrongfully collected under the internal revenue

laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax penalty or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced."

Revised Statutes, Section 3220:

"Except as otherwise provided by law in the case in income, estate, and gift taxes, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector, the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the costs and expenses of suit; also damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section."

Revised Statutes, Section 3226:

"(a) *Limitations*—(1) *Claim.* No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(2) *Time.* No such suit or proceeding shall be begun before the expiration of six months from the

date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

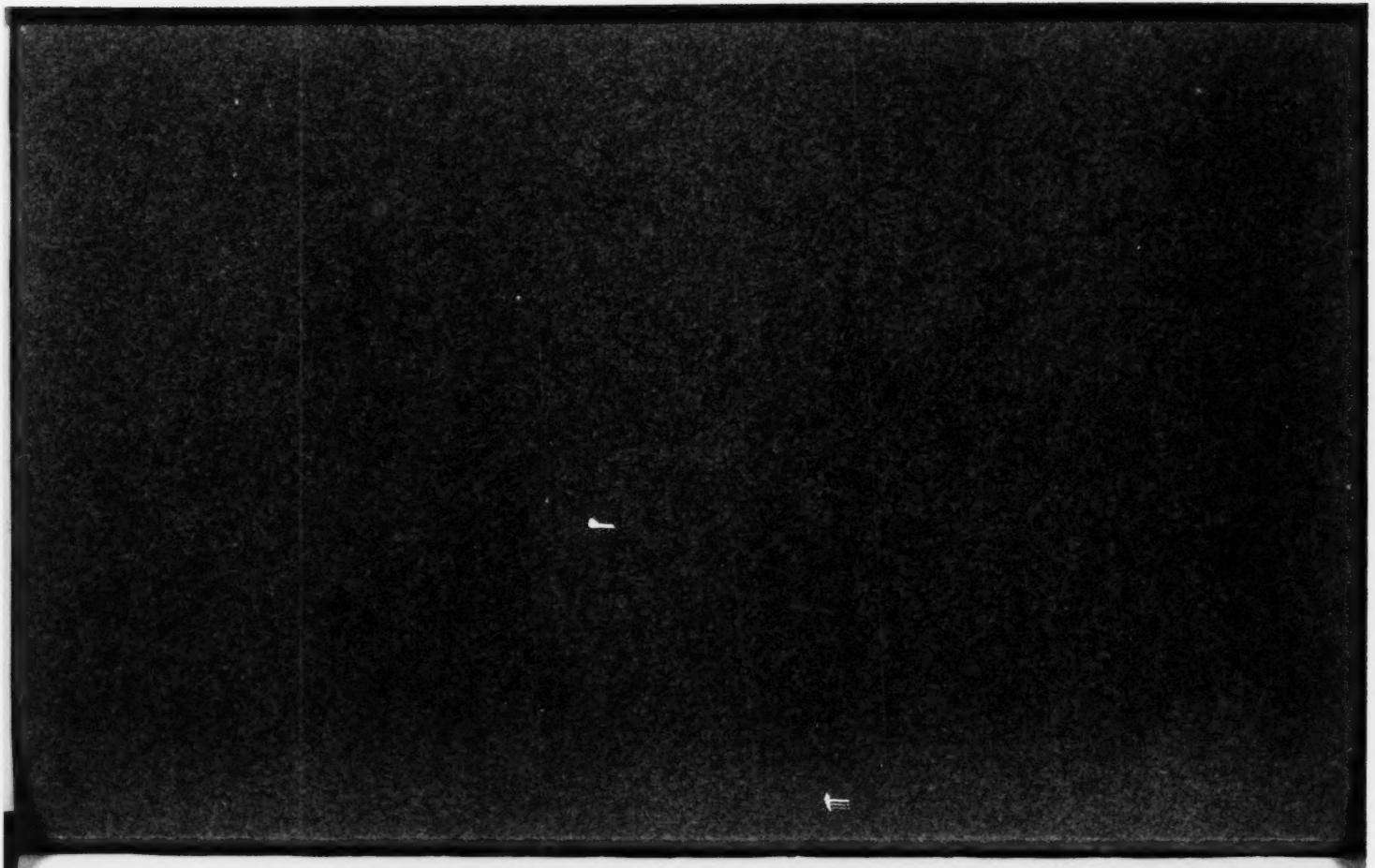
(b) *Protest or duress.* Such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress."

Revised Statutes, Section 3228:

"All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, estate, and gift taxes, be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund."

Revenue Act of 1924, Title III, Estate Tax, Section 301(b):

"(b) The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia in respect of any property included in the gross estate. The credit allowed by this subdivision shall not exceed 25 per centum of the tax imposed by this section."



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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 327

ISABELLE HAMMOND-KNOWLTON, AS ADMINISTRATRIX *cum testamento annexo de bonis non* OF THE ESTATE OF CHARLES C. KNOWLTON, DECEASED, PETITIONER

v.

THE UNITED STATES OF AMERICA, AS SUBSTITUTED DEFENDANT FOR THE HARTFORD-CONNECTICUT TRUST COMPANY OF HARTFORD CONNECTICUT, EXECUTOR U/W ROBERT O. EATON, DECEASED, FORMER COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The first opinion of the Circuit Court of Appeals in this case is reported in 89 F. (2d) 175, and the denial of certiorari by this Court, in 302 U. S. 707. Subsequent unreported district court opinions denying the Government's motion to dismiss, its motion to vacate orders permitting amendments of

the complaint, and its motion for judgment are set forth in the record at pp. 48–50, 51–54, and 59–69, respectively. The second opinion of the Circuit Court of Appeals, (R. 79–106), is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 21, 1941 (R. 118). The petition for a writ of certiorari was filed on July 31, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Circuit Court of Appeals held that the taxpayer's suit for refund could not be maintained against the Collector, and this Court denied certiorari. Meanwhile, the statute of limitations had run on an action against the United States. The question is whether the taxpayer might nevertheless amend her complaint, *nunc pro tunc,* to substitute the United States as party defendant and to reduce the amount of the claim from $15,000 to $10,000, the jurisdictional limit of the Tucker Act.

STATUTES AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix.

STATEMENT

Charles C. Knowlton, the decedent, died October 12, 1924. On October 10, 1925, his administratrix

filed a return for federal estate tax purposes, showing a tax of $79,686.06, against which a credit of $19,921.51, 25 percent of the tax, was claimed for estimated state inheritance taxes as allowable under Section 301 (b) of the Revenue Act of 1924. The difference, amounting to $59,764.55, was paid on or before October 10, 1925 (R. 29–30). No part of these payments was excessive or in any manner wrongfully collected (R. 30).

The Commissioner made a final audit of the return and reported the results of the audit to the estate in a letter dated October 21, 1926. The audit resulted in an increase in the value of certain securities held by the estate. But in view of the fact that the rate of the tax had been reduced by Section 322 (a) of the Revenue Act of 1926, amending Section 301 (a) of the Revenue Act of 1924, the estate's tax was determined as $59,155.51, or $609.04 less than the amount paid (R. 32–33).

On April 12, 1927, the estate paid to the State of Connecticut the sum of $72,372.21, the amount due for state inheritance taxes as certified by the judge of probate. Three and one-half years later, on October 16, 1930, an additional $278.78 was paid. No other payments have been made on account of the state inheritance tax, and no further assessments have been made by the State of Connecticut for succession or inheritance taxes (R. 34).

On December 26, 1931, the taxpayer forwarded to the Commissioner a document labelled "Supple-

mental data on audit of return—Evidence for credit and refund," claiming a refund of $20,744.32 in federal estate taxes because of state inheritance taxes paid and submitting proof of payment (R. 33–34).

The Commissioner treated the document as an original claim for refund and rejected it July 6, 1932, because it had not been filed within four years after payment of the tax sought to be recovered. Revised Statutes, Section 3228, as amended by the Revenue Act of 1928, Section 619 (c). (R. 35.) He later refused to reopen the claim for the same reason (R. 40–42).

On March 1, 1933, suit was brought against the Collector and upon his death continued against his executor. Judgment was entered for the taxpayer in the amount of $14,788.88, representing the statutory credit of 25 per cent for state inheritance taxes paid (R. 1). On appeal the court below held that the suit against the Collector could not be maintained (R. 1); although it considered in inconclusive fashion the Government's contention that the claim for refund had not been timely filed, the opinion has now been construed as not passing upon that point. (R. 80). An order was entered reversing the judgment of the lower court, and remanding the cause for a new trial (R. 5). This Court denied certiorari.

Thereafter, over the objections of the Government, the district court permitted the taxpayer to

amend her complaint, *nunc pro tunc,* by substituting the United States as defendant and by limiting the claim to $10,000, and such interest as may be allowed by law (R. 7–12, 13–14, 27, 45–47). The district court ruled that the claim for interest referred only to interest after judgment (R. 68–69).

The case was retried upon an agreed statement, based on evidence introduced at the first trial (R. 28). It was further stipulated that the defendant had duly preserved its rights to have the propriety of all interlocutory orders reviewed on appeal (R. 44). The defendant's motion for judgment on behalf of the United States (R. 55–58) was denied, and judgment for $10,000, with interest after the date of judgment, was entered for the taxpayer (R. 70).

The court below reversed the judgment of the District Court on the grounds that the amendment could not be made after the statute of limitations had run.

DISCUSSION

The decision of the court below, that the amendment could not be made, revolves about the basic proposition that an action against the Collector of Internal Revenue is, under the decisions of this Court, probably to be considered "personal" in nature, separate and distinct from a cause of action against the United States. *Sage* v. *United States,* 250 U. S. 33; *Bankers Coal Co.* v. *Burnet,* 287 U. S. 308; see *Sunshine Coal Co.* v. *Adkins,* 310 U. S.

381, 403; but cf. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373. The Government recently sought review of this question in *United States* v. *Nunnally Inv. Co.,* No. 990, October Term, 1940, and the petition was denied May 26, 1941.[1] However, a petition for rehearing of that petition is now pending.

The decision of the court below is consistent in result with that of the Court of Claims in the *Nunnally* case and with this Court's denial of certiorari. The opinion, however, underscores the uncertainty which prevails on this question, and the importance to the orderly conduct of the Government's tax litigation that the question receive authoritative determination by this Court. If, therefore, the Court grants the Government's petition for rehearing in the *Nunnally* case, we do not oppose the issuance of a writ in this proceeding.[2]

If, on the other hand, the Court should deny our petition for rehearing in the *Nunnally* case, it would seem to follow that it sees no occasion to reexamine the existing rules as to the nature of the suit against the collector. In that event,

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[1] This case was reported below at 36 F. Supp. 332 (C. Cls.).

[2] We should, however, urge that even if the actions against the Collector and against the United States be viewed as substantially identical, the taxpayer yet cannot recover because (a) the original claim for refund was not timely filed, and (b) the original suit was for more than $10,000 and thus, at least until the amendment of the complaint after the statute had run, was not within the jurisdiction conferred by the Tucker Act.

there is no basis for review of the instant case[3] and the taxpayer's petition here should likewise be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.

AUGUST 1941.

[3] The original determination that the taxpayer could not sue the Collector is supported, as pointed out by the court below (R. 81), by this Court's subsequent decision in *Lowe Bros. Co.* v. *United States*, 304 U. S. 302.